IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.3 OF 2006

1) Rukhmabai w/o Pandurang Sonwane
Age: 65 Yrs., occu. Labour,

2) Ramawtar s/o Pandurang Sonwane
Age: 23 Yrs., occu. Labour,

Both R/o Virwade, Tq. Chopda,
District Jalgaon. .. APPELLANTS
(Orig.Accused nos. 1 & 2)

VERSUS

The State of Maharashtra. .. RESPONDENT

.....

Shri P.B.Patil Advocate for Appellants;
Shri P.B.Varale APP for Respondent.

.....

CORAM: P.V.HARDAS &
S.P.KUKDAY,JJ.
Date : 11.10.2007.

JUDGMENT (PER: S.P.KUKDAY,J.)

. Appellants are convicted of the offences punishable under section 302 read with 34 of the Indian Penal Code for committing murder of Rekha daughter in law of appellant no.1. They are sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- each in default to suffer rigorous imprisonment for one year, by Ad-hoc Additional Sessions Judge, Amalner. This order of conviction and sentence is impugned in the present appeal.

2) Facts of the prosecution case lie in a narrow compass. Rajendra Pandurang Sonawane is serving in forest

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department and was living with his wife Rekha (deceased) and two children at Nasik. His father Pandurang, mother Rukhmabai (Appellant no.1) and brothers Nanabhau and Ramavtar (Appellant no.2) were jointly living at their native place Virwade. The deceased had come to Virwade for Dassera. On 10th November, 2001 at about 8.00 or 8.30 p.m. there was a quarrel between her and Rukhmabai as the deceased did not allow daughter of Ramavtar to play on the bed. On his return to the house Ramavtar quarreled with the deceased. Mother and son then beat her. She somehow extricated herself from the situation and slept inside the house. At about 3.00 or 3.30 in the night of 11th, appellant no.1 sprinkled kerosene on her person. The deceased woke up when the kerosene touched her skin, to find both the appellants sanding near her. Appellant No.2 ignited match stick and threw it on her person. The deceased started shouting as her clothes caught fire. In response, her brother in law Nanabhau came to her rescue and doused the fire. he then took the deceased to Cottage Hospital at Chopda with the assistance of neighbours. At the hospital medical officer Dr. Sarvayya (P.W.5) treated her and informed Chopda Police of the medico legal case. In response ASI Nana Bagul (P.W.3) visited the Cottage Hospital and on the assurance of the medical officer that the deceased is in a fit condition to make a coherent statement, recorded statement of the deceased (Ex.30) in

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his presence during 5.00 to 5.30 in the morning. On the basis of this statement offence came to be registered against the appellants under sections 307 read with 34 of the Penal Code and the investigation was taken over by API Deshmukh (since deceased). The investigating officer ensured that requisition letter is sent to the Executive Magistrate for recording dying declaration of the deceased but her statement could not be recorded by the Executive Magistrate as the deceased was shifted to Civil Hospital at Jalgao for treatment. The investigating officer thus intimated Zilla Peth Police to make arrangements for getting the statement of deceased recorded by the Executive Magistrate. However, no action was taken by Zilla Peth Police. The investigating officer visited the scene of occurrence on the same day and attached pieces of nylon clothes of the deceased under panchanama of the scene of occurrence. He then arrested the appellants. The deceased succumbed to the injuries sustained by her on 20th November 2001. As a sequel, the penal section 307 was changed to section 302 of the Penal Code. Police officer attached to Hospital Chowky of Zilla Peth Police Station Jalgaon; recorded A.D.No.0/2001 and held inquest on the dead body (Ex.25). The dead body was then sent for postmortem. Dr. Surwade (not examined) performed autopsy and prepared postmortem report (Ex.27, admitted by the defence) opining that the deceased died due to 63% burns.

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On completion of the investigation the appellants came to be charge sheeted.

3) At the trial appellant no.1 pleaded false implication. According to her Ramavtar (Appellant no.2) was residing separately from them in the village and had gone out for work. On the fateful night, the deceased who had come for the festival, was sleeping inside the house and she was sleeping in the court yard of the house with her husband, son Nanabhau and children of the deceased. At about 3.00 o' clock they heard cries of the deceased and ran inside the house. Neighbours had also come to their house on hearing the cries of the deceased. All of them extinguished the fire. They found that the deceased was unconscious and the lantern hanging on the wall was lying on the floor in broken condition. They immediately took the deceased to Cottage Hospital at Chopda for treatment.

4) Appellant no.2 also pleaded innocence. He claimed that he is residing separately from his parents. On 10.11.2001 he went out for the work of loading cotton in the truck for Rajendra Surana with other workers and returned on the next day at about 10.00 a.m. and was informed of the incident. He then immediately went to the hospital. Appellant no.2 has examined Rajendra Surana

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(D.W.1) to establish his alibi.

5) In support of its case the prosecution examined five witnesses. The present case entirely rests on the dying declaration recorded by ASI Nana Bagul (P.W.3). On receipt of the requisition from PSO, ASI Bagul visited Cottage Hospital, verified from the medical officer that the deceased is in fit mental state to make a coherent statement and recorded her statement in his presence. The deceased mentioned in her statement that at about 8.00 or 8.30 p.m. appellant no.1 quarreled with her as she did not allow daughter of appellant no.2 to play on the cot due to likelihood of her soiling the bed. On return of appellant no.2 both the appellants subjected her to merciless beating. She some how extricated herself and slept inside the house on that night. At about 3.00 o' clock in the night she woke up on sensing wetness of the clothes to find both the appellants standing near her. Appellant no.1 had sprinkled kerosene on her person; appellant no.2 ignited a match stick and set her on fire. In response to her cries Nanabhau extinguished the fire. She was then taken to the hospital. In the cross examination ASI Bagul categorically stated that he obtained endorsement of the medical officer on the sheet of paper used for recording dying declaration before the commencement of recording the statement.

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6) Autopsy surgeon Dr. Sarvayya (P.W.5) stated that after admission of the deceased to the hospital at about 4.15 a.m. he informed Chopda Police of the MLC case. Police officer approached him at about 5.00 a.m. They went to the ward and asked the relatives of the deceased to leave the place. He then examined the patient and found that she is in a fit state of mind and well oriented to make a statement. After his examination of the patient the officer recorded statement of the deceased in his presence. After completion of the recording of the statement he again examined the patient at about 5.30 a.m. and found her to be in fit mental state. He thus made endorsement on the dying declaration. The patient was then referred to Civil Hospital, Jalgao. In the cross examination the autopsy surgeon conceded that the endorsement regarding fitness of the patient was made at the end of the proceedings.

7) Nimba Garbad Koli (P.W.4) stated that the deceased was living with both the appellants and her father in law. After receiving telephonic message he went to the hospital with his wife and others. At the hospital the deceased told him that at about 3.00 o' clock in the night appellant no.1 poured kerosene over her person and appellant no.2 set her on fire. In the cross examination

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Nimba (father of deceased) exhibited hostility by contradicting his statement in the examination in chief that appellants were living jointly by conceding (i) that appellant no.2 was residing separately from his parents (ii) that statement of the deceased was recorded by the police in his presence and that the deceased had not disclosed to police why she was set on fire (iii) that both hands of the deceased were bandaged. He also persisted in maintaining that the deceased had not disclosed why she was set on fire though he made inquiries regarding the cause of occurrence.

8) Rajendra Surana (D.W.1) stated that he employed eight labourers including appellant no.2 in the evening at 6.00 p.m. for loading cotton in the truck hired from transporter. The truck was loaded at Virwade and then at Khardi till 8.00 a.m. on the next day. On his return to Virwade he came to know that Rekhabai died due to burning at Virwade. In the cross examination, Rajendra conceded that he does have documents in his possession to show that he purchased cotton from the cultivators and hired a truck for loading this cotton. He further conceded that he has documents to show that he paid wages to the labourers but has not filed these documents on record.

9) At the conclusion of the trial, the Sessions Judge

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found that the dying declaration of the deceased inspires confidence. He further found that the defence version propounded by appellant no.1 is false and appellant no.2 has failed to establish his alibi. In conformity of this finding learned Sessions Judge convicted the appellants of the offence punishable under section 302 read 34 of the Penal Code and sentence them as stated earlier.

10) Main plank of the argument of learned counsel Shri P.B.Patil for the appellants is that the dying declaration recorded by Police Officer deserves to be excluded from consideration as no steps were taken for getting the dying declaration recorded through the Magistrate though the deceased was alive for about ten days after the occurrence. Referring to the admission given by father of the deceased that statement of his daughter was recorded at Jalgao hospital in his presence, learned counsel contends that adverse inference be drawn against the prosecution for suppression of material evidence. According to learned counsel apart from these infirmities the fact that thumb impression of the deceased could not have been obtained on the dying declaration, the fact that appellant no.2 was living separately from his parents and was not in the village; impair evidentiary value of the dying declaration.

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11) Per contra, learned APP Shri Varale supports the order of conviction and sentence on the premise that no infirmity can be found with the dying declaration of the deceased proved by the prosecution.

12) First contention of learned Counsel that no reliance can be placed on the dying declaration as it is recorded by the Police officer is based on the observations of the Apex court and the Division Bench of this Court. In Dalip Singh and others V. State of Punjab (AIR 1979 SC 1173) rule enunciated in Munnu Raja and another V. State of Madhya Pradesh (AIR 1976 SC 2199) is followed. In Munnu Raja (supra) Their Lordships observed in para 11 of the report that the Investigating officers are naturally interested in the success of the investigation. Thus, practice of investigating officer himself recording the dying declaration during the course of investigation ought not to be encouraged. It is for this reason Their Lordships excluded third dying declaration from consideration. Their Lordships rejected argument based on the earlier decision in the matter of **Balak Ram V. State of U.P. (AIR 1974) SC 2165)** that the second dying declaration made to the investigating officer be treated as suspect. Rejecting this argument it is observed in para 9 of the report:

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". The error of this argument consists in the assumption that the dying declaration was made to an investigating officer. The statement, Ex.P-14, was made by Bahadur Singh at the police station by way of a first information report. It is after the information was recorded, and indeed because of it, that the investigation commenced and, therefore, it is wrong to say that the statement was made to an investigating officer. The

Station House Officer who recorded the statement did not possess the capacity of an investigating officer at the time when he recorded the statement. The judgment on which the counsel relies has therefore no application."

14) The principle that in appropriate cases if the recording of the statement by the investigating officer is justified, it can be relied upon is acknowledged by the Apex Court In **Kulwant Singh V. State of Punjab, (2004) 9 SCC 257.** In that case the deceased was unconscious from the beginning and regained consciousness on the fifth day when his statement was recorded by the investigating officer. In this background it is observed by Their Lordships in para 35, 36 and 37 of the report:

. "35. Section 32 of the Indian Evidence Act, 1872 nowhere states that the dying declaration must be recorded

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in the presence of a Magistrate or in other words, no statement which has not been recorded before the Magistrate cannot be treated to be a dying declaration. The fact that the investigating officer from the beginning intended to take the statement of Partap Singh is not in dispute. The endorsement made by the doctor in Ext.PQ/1 and Ext.PR/1 would clearly show that he had not been found fit to make such statement. Only on the fifth day, i.e. 18-06-1987, the statement of Partap Singh could be recorded.

. 36. Section 32 of the Indian Evidence Act also does not state that a dying declaration should be made only in expectation of death and in that view of the matter, the fact that Partap Singh died on 26-6-1987 after a period of one week is of no consequence. Explanation I to Sub-Section (1) appended to Section 32 specifies that when the statement is made by a person as to the cause of his death, or any of the circumstances of the transaction which resulted in his death where cause of death of that person's death comes into question would be a relevant factor.

. 37. P.W.9, the investigating officer Hukum Singh has proved the statement of Partap Singh. He deposed that he was fully conscious when he made the statements which

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were read over to him. In that view of the matter, the said statements are admissible under section 32 of the Indian Evidence Act."

15) In all cases dying declaration recorded by the Investigating Officer can not be rejected merely on that ground. Whether to rely upon such a statement or not depends on the quality of evidence and probabilities of the prosecution case and has to be decided on the facts and circumstances of each case. In the present case the dying declaration is not recorded by the investigating officer. It is recorded by ASI Bagul on getting intimation of medico legal case from the cottage hospital. This statement is treated as FIR and the offence is registered on the basis of this statement. In these circumstances, we are unable to sustain contention of learned Counsel Shri P.B.Patil, that no reliance can be placed on the dying declaration recorded by ASI Bagul.

16) It is next contended that the prosecution is guilty of suppressing statement of the deceased recorded at Civil Hospital, Jalgao. In view of the suppression of material evidence, no reliance should be placed on the dying declaration Ex.30. In support of this contention reliance is placed on the decision of the Division Bench of this Court In Prabhakar Wamanrao Salve V. State of Maharashtra

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(2006 ALL M R (Cri.) 1274 to which one of us (Hardas,J.) is a party. In that case it was found that statement of Nita recorded by PSI Shaikh prior to the recording of dying declarations Ex.23 and 34 was suppressed. It was further found that dying declarations do not inspire confidence as earlier history of accidental death was recorded by Dr. Sharma. In view of these infirmities it was found that dying declarations were not reliable. The dying declarations were not discarded merely on account of suppression of earlier statement recorded by PSI Shaikh as sought to be canvassed by learned Counsel Shri P.B.Patil. In the present case contention that one of the statements recorded by Police Officer at Jalgao is suppressed by the prosecution is founded on the admission of Nimba, father of the deceased. Nimba has referred to oral dying declaration of the deceased in his examination in chief. He further mentioned that the deceased was living with her father in law and both the appellants. However, for the reasons best known to him, father of the deceased has given admission in his cross examination that appellant no.2 was living separately from his parents. Recording of statement of the deceased by Police officer at Jalgao hospital is one of the other admissions given by Nimba. In view of this hostility exhibited by Nimba, no reliance can be placed on his testimony in the absence of corroboration. In fact, as statement of the deceased was

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already recorded by the officer attached to Chopda Police Station having jurisdiction to investigate the offence, it is difficult for us to envisage how Jalgao Police could have recorded statement of the deceased. Considering the fact that Nimba has shown hostility in his cross examination, we are not inclined to place reliance on an adverse admission given by him in the cross examination in the absence of independent corroboration.

17) Learned Counsel has next questioned probative value of the dying declaration, on the basis of the admission given by hostile witness Dhondu Patil (P.W.1) and Nimba (P.W.4) that appellant no.2 was living separately from his parents. After testifying that there was kerosene lamp near the door of the house, the witness denied that spot panchanama was prepared in his presence. He was thus declared hostile. In the cross examination Dhondu then gave an admission that appellant no.2 was living separately from his parents. Once Dhondu denied his presence at the scene of occurrence, at the time of preparation of spot panchanama, no reliance can be placed on the admissions given by him during his evidence. Similarly, as Nimba in his examination in chief has categorically testified that his daughter was living with her father in law and the appellants, it is not possible to rely on the admission given by him regarding separate

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residence of appellant no.2 in his cross-examination. In this background, we are satisfied that these witnesses were won over by the defence. In the light of these facts, we are not inclined to place reliance on the adverse admissions given by them. In this view of the matter, we cannot sustain contention of learned Counsel that appellant no.2 was living separately from his parents.

18) Learned Counsel has also made reference to the defence adopted by the appellants during their examination under section 313 of the Criminal Procedure Code that the deceased died an accidental death. We have already pointed out that once Dhondu denied his presence at the scene of occurrence at the time of the preparation of Panchanama, no importance can be attached to the admission given by him that there was a kerosene lamp near the door of the house. Thus, theory of accidental death has no support from the material on record. We, therefore, do not find any fault with the conclusion of learned Trial Judge that the defence has failed to establish theory of accidental death. Referring to the fact that the deceased had sustained only 63% burns, the Trial Judge has rightly concluded that no adverse inference can be drawn from the fact that thumb impression of the deceased was obtained by PSI Bagul, on the basis of tainted evidence of Nimba that

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hands of the deceased were bandaged.

19) Last contention of learned Counsel for the appellants Shri Patil is in respect of alibi. Learned Counsel would argue that evidence of Rajendra (D.W.1) deserves credence. Rajendra has made a false statement that on his return to the village after loading of the truck with cotton, he came to know that the deceased died at Virwade of the burns suffered by her. Besides, the witness admitted that he does posses documentary evidence to show that wages were paid to appellant no.2 and other workers on that day but has not produced the documentary evidence which according to his own showing was available. The Trial Judge has thus, rightly declined to place reliance on the testimony of Rajendra. In the light of these facts, we can not persuade ourselves to sustain contention of learned Counsel for the appellants that appellant no.2 has established his alibi.

20) Turning to the merits, it is by now well settled that conviction can be founded on the sole evidence of the dying declaration. Statement of the deceased made at the time of death is bestowed with the sanctity of oath on the premise that at such a solemn moment the soul of dying person sheds all the pride and prejudices and that the dying man would not meet the maker with a lie in his

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mouth. On this principle, exception is made to the hear say rule by section 32 of the Evidence Act which makes statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death, admissible in evidence. Once the court is satisfied that what is stated by the deceased is unalloyed truth, there can be no impediment in founding conviction on the basis of the dying declaration. This principle is reiterated by the Apex Court In **Heeralal Yadav Vs. State of M.P.,(2006) 10 SCC 718.** Dealing with this aspect, it is observed in para 7 of the report:

"7. The principle that "no man at the point of his death is presumed to lie. A man will not meet his maker with lie in his mouth" is based on sound public policy. No doubt, as the dead man would not be available for cross examination, a duty is cast upon the court to examine the dying declaration with care and caution as to whether the dying declaration is creditworthy for acceptance. In other words, whether it inspires confidence on the basis of which alone conviction can be recorded. Similarly, it is also an accepted principle of law that the dying declaration, keeping in view the above principles in mind, if inspiring confidence could be the sole basis for conviction."

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21) Considering the circumstances which were similar to the circumstances of the present case where the prosecution witnesses had turned hostile, **In Ravi V. State of T.N. (2004) 10 SCC 776** Their Lordships observed:

"3. In the presence case, the first information report was lodged on the basis of the statement of PW 1 who is nobody else than the wife of the deceased. According to the first information report, four persons, including the informant, PWs 2, 3 and 4 were eyewitnesses to the alleged occurrence but none of them has supported the prosecution case in their substantive evidence in court, as such they have been declared hostile. Conviction of the appellant is based solely on dying declaration of the victim, which was recorded by a Judicial Magistrate, PW 11 in the presence of the doctor, PW 7. It is well settled that if the truthfulness or otherwise of the dying declaration cannot be doubted, the same alone can form the basis of conviction of an accused and the same does not require any corroboration, whatsoever, in law. Therefore, the question to be considered is whether there was any infirmity in the dying declaration."

22) In the present case, PSI Bagul (P.W.3) has testified to the procedure followed by him at the time of recording of the dying declaration. Medical officer Dr.

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Jagdhish (P.W.5) has fully corroborated his evidence. Dr. Jagdhish has stated that relatives of the deceased were asked to go away and the statement of the deceased was recorded by the Police officer in his presence. He has certified fitness of the deceased to make a coherent statement by making an endorsement in the margin. Learned counsel for the appellants referred to the admission of PSI Bagul that the endorsement was made by the medical officer in the beginning of the recording and the admission of the medical officer that he made the endorsement at the end of the recording of the statement. No sinister inference can be drawn from this anomaly. What has happened is that the endorsement is made in the margin with the noting below the signature of the medical officer showing that the deceased was conscious during 5.00 to 5.30 a.m. This noting explains the so called divergence in the evidence of the medical officer and PSI Bagul. Testimony of these witnesses establish that due procedure was followed while recording dying declaration of the deceased and the deceased voluntarily made the statement in presence of unbiased witnesses.

23) It is admitted that the deceased was ordinarily residing with her husband at Nasik. She was visiting parents of her husband on the occasion of Dassera. Admittedly, she had no animosity towards her mother in law

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or brother in laws. The story narrated by the deceased is simple, logical and harmonious. There is no attempt whatsoever at exaggeration or embellishment. The deceased had simply stated that because she did not allow daughter of appellant no.2 to play on the bed, the appellants beat her. They worked up passion and in the dead of night, set her on fire. In our considered opinion, in the absence of motive to falsely implicate the appellants, there can not be any impediment in accepting this unvarnished version of the incident given in the dying declaration. In the light of this, we uphold order of conviction and sentence recorded by learned Trial Judge. In the result, the appeal fails and is dismissed accordingly. As the appellant no.1 – Rukhmabai Pandurang Sonwane is on bail, she is directed to surrender before the trial Court within

a period of four weeks from today for serving remaining part of the sentence of imprisonment.

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(S.P. KUKDAY, J.) (P.V.HARDAS, J.)

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